Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 9, 1991

Ms. Elaine H. Piper
Assistant City Attorney
Police Legal Advisor
The City of El Paso
2 Civic Center Plaza
El Paso, Texas 79999

OR91-359

Dear Ms. Piper:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 12737.

You have forwarded to us for review representative samples of documents in the El Paso Police Department's file regarding a shooting that took place on May 28, 1987. You have grouped those documents in three exhibits, which you have labeled exhibits A-C.

We note first that your request for a decision was not submitted to this office within the time period required by section 7(a) of the Open Records Act. That section provides that if a governmental body fails to request a decision within the designated time, "the information shall be presumed to be public information." This heightened presumption of openness may only be overcome by making a compelling demonstration of reasons why the information should not be released. *See* Open Records Decision No. 586 (1991) (copy enclosed). However, information that is deemed confidential by law under section 3(a)(1) of the act is not subject to this presumption. Since you assert that section 3(a)(1) applies to portions of the requested information we address first the availability under the Open Records Act of the portions to which you assert section 3(a)(1) applies.

Thus, we turn first to the documents in exhibit A. Included in that exhibit are representative samples of police reports on the incident. You have marked in yellow the portions of the sample reports that you contend are excepted from required public disclosure by section 3(a)(1).

Section 3(a)(1) excepts from required disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." We are unaware of any statute that makes the information contained in the sample reports confidential. Section 3(a)(1), however, incorporates the common law privacy doctrine as well as constitutional privacy. With regard to the common-law doctrine, this office has long employed a two-prong test taken from *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert denied*, 430 U.S. 931 (1977). Pursuant to that test, information is protected by common-law privacy only if (1) it contains highly intimate or embarrassing facts about a person's private affairs, the publication of which would be highly objectionable to a reasonable person, *and* (2) the information is not of legitimate concern to the public. We have highlighted in blue on separate copies of the documents you included in exhibit A the information that satisfies both prongs of the test, which you must withhold from disclosure. *See generally* Open Record Decision Nos. 422 (1984); 370 (1983); 262 (1980) (copies enclosed). You may not withhold information concerning why the subject of the reports was fired by a past employer who was a governmental body since the reason for firing a public employee is information that is of legitimate concern to the public. You also may not withhold information indicating similar conduct of the subject on the day of the incident since the public has a legitimate interest in such conduct by a public employee.

We turn next to the availability under the act of the portion to which you assert section 3(a)(8), the law enforcement exception applies. Section 3(a)(8) excepts from required public disclosure

> records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution. . . .

You explain that physical evidence of the crime was submitted by the El Paso Police Department for analysis to a Federal Bureau of Investigation (FBI) laboratory in Washington, D.C. You argue that section 3(a)(8) applies to the report of the laboratory's analysis submitted in response to the El Paso Police Department. That report is included in Exhibit B. To overcome the heightened presumption of openness, you have provided us a copy of a letter from the FBI stating that the

report was furnished to the department solely for its use in a criminal investigation and cannot be further disseminated. That letter refers to section 534 of Title 28 of the United States Code, which authorizes the FBI to exchange various criminal records with authorized state officials for official use. Section 534 also provides that the exchange of records is subject to cancellation if dissemination is made outside the receiving entity. *See generally* Open Records Decision Nos. 561, 565 (1990). You state that it is common for the El Paso Police Department to use the FBI laboratory, and you argue that release of the report in issue here is likely to harm the department's relationship with the FBI and thus deter future crime prevention and law enforcement since the FBI may pursuant to section 534 refuse in the future to make its laboratory or the reports of laboratory analyses available to the El Paso Police Department. We conclude you have made a compelling demonstration sufficient to overcome the heightened presumption of openness, and thus, you may withhold the report pursuant to section 3(a)(8).

We last turn to exhibit C, which contains representative samples of the documents in issue. You cite section 2(1)(G) of the Open Records Act, which excepts the judiciary from the act, and assert that the grand jury is an extension of the judiciary with regard to those documents. You describe those documents as copies of records obtained from the Hidalgo County Sheriff's office by a grand jury by use of a grand jury subpoena. You have included in exhibit C a copy of that subpoena. You state that the El Paso Police Department obtained a copy of those documents from the grand jury to assist the department in acquiring additional evidence to present to the grand jury. The Open Records Act does not apply to information within the actual or constructive possession of the grand jury. Information acquired by a grand jury by subpoena is within the constructive possession of the grand jury even though physically held by another person. *See* Open Records Decision Nos. 513 (1988); 411 (1984). Since the department obtained its copies from the grand jury which had earlier acquired the records from the Hidalgo County Sheriff's office by subpoena, the department's copies are within the constructive possession of the grand jury, and thus, are not subject to required disclosure under the Open Records Act.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR91-359.

Yours very truly,

Celeste A. Baker

Celeste A. Baker
Assistant Attorney General
Opinion Committee

CAB/lb

Ref.: ID# 12737, 12886, 12982, 13016, 13198

Enclosures: documents; Open Records Decision Nos. 586, 513, 422, 411, 370, 262.

cc: Linda Lee Chew
Douglass, Chew & Chew
604 Myrtle Avenue
El Paso, Texas 79901